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Apparent Authority in Scots Law: Some International Perspectives

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A. INTRODUCTION

As a general rule, an agent acting beyond the confines of his authority is unable to create contractual relations between his principal and another party (the “third party”). Apparent authority operates to temper the effect of this rather severe rule, protecting third parties where the principal creates an impression of authority which he subsequently wishes to deny. This article seeks to identify the principles of the Scots law of apparent authority which are, at present, far from clear. It then places those principles within a comparative context, examining them in the light of three international “codes” or instruments: the *UNIDROIT Convention on Agency in the International Sale of Goods*, the *Principles of European Contract Law*, and the *UNIDROIT Principles of International Commercial Contracts 2004*. In the process this reveals the ease with which Scots law could adapt to harmonisation of agency law at European level, should this occur. The article also considers moves away from traditional reasoning on apparent authority, based on bar or estoppel, towards reasoning based on what is known as “the risk principle”, typified in recent case law of the Dutch Supreme Court.

Apparent authority, which Stoljar described as “the chief problem in agency”,¹ is a concept which is well-known in both Common Law and Civilian legal systems. It is one of two main exceptions to the rule that an unauthorised agent is unable to bind his principal in a contract with the third party² (the other exception being the principal’s ability to ratify a contract which the unauthorised agent purported to conclude).³ It applies where the principal, through his acts or omissions, has given the third party to understand that the agent was fully authorised to enter into the particular contract. The third party, relying on that impression, naturally considers himself bound in a contract with the principal. If the principal then seeks to deny the existence of a contract, citing the agent’s lack of authority, apparent authority, as a form of personal bar, prevents the principal from acting inconsistently. In this way, the principal is barred from pleading the agent’s lack of authority in the context of an action raised by the third party, who is thus afforded the same level of protection as he would have had if a contract binding him to the principal had actually existed.

However, this well-known concept lacks a solid conceptual framework. The problem is particularly acute in a legal system such as Scotland’s, where the amount of case law is small. As a result, it is natural to look outwards in order to study the concept in a wider European framework. The three initiatives used

1 S J Stoljar, *The Law of Agency* (1961) 20.

2 W M Gloag, *The Law of Contract*, 2nd edn (1929) 143.

3 Although ratification is subject to relatively stringent conditions: see L Macgregor, “Agency and Mandate”, in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2002) paras 62-74.

in this article to provide a comparative context have been identified above. The first is the *UNIDROIT Convention on Agency in the International Sale of Goods* (“the Convention”).⁴ Dating from 1983, it has yet to come into force, lacking the minimum of ten ratifications.⁵ The second is the *Principles of European Contract Law* (“PECL”),⁶ which devotes an entire chapter to agency.⁷ This initiative is especially important given the moves within the European Union towards harmonisation in the field of contract law, particularly the European Commission’s plans to create a Common Frame of Reference for European contract lawyers.⁸ The third is the *UNIDROIT Principles of International Commercial Contracts 2004* (“PICC”).⁹ In contrast to the aim of the Convention, PECL and PICC are of a non-binding nature and can be considered “soft law”. They aim to establish rules of general contract law within the European Union and on a world-wide level, respectively.¹⁰

Apparent authority focuses on placing liability on the principal, either in the form of a damages action raised by a third party, or an action for implement of the contract purportedly formed by the agent. The principal is not, however, the only party liable in this situation. The third party may raise an action against the agent for what is known in Scotland as breach of warranty of authority,¹¹ or more generally in Europe as the liability of the *falsus procurator*. This type of action is less common, probably because it is often impossible, the agent having absconded.

4 Available at <http://www.unidroit.org/english/conventions/1983agency/main.htm>. The UNIDROIT Agency Convention is referred to in the footnotes as “UAC”. See further D Busch, *Indirect Representation in European Contract Law: an evaluation of Articles 3:301 – 304 of the Principles of European Contract Law concerning some contractual aspects of indirect representation against the background of Dutch, German and English law* (2005) 175-195; M J Bonell, “Agency”, in A Hartkamp, M Hesselink, E Hondius, C Joutstra, E Du Perron and M Veldman (eds), *Towards a European Civil Code*, 3rd edn (2004) 381.

5 See art 33 UAC. There are currently five: France ratified on 7 August 1987, Italy on 16 June 1986, and Mexico, the Netherlands and South Africa acceded to the Convention on 22 December 1987, 2 February 1994 and 27 January 1986 respectively. Since 2 February 1995 the accession of the Netherlands has also applied to Aruba. As regards these ratifications see <http://www.unidroit.org/english/implement/i-main.htm>.

6 Available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/Skabelon/pecl_engelsk.htm. See A Hartkamp, “Principles of Contract Law”, in Hartkamp et al, *Towards a European Civil Code* (n 4) 125; Busch, *Indirect Representation* (n 4) 197-210; Bonell (n 4).

7 Chapter 3: Authority of Agents. For the full text with comments and notes, see O Lando and H Beale (eds), *The Principles of European Contract Law: Parts I and II* (2000).

8 See European Commission Communication to the European Parliament, *A More Coherent European Contract Law: An Action Plan* (COM (2003) 68 final).

9 See Chapter 2: Formation and Authority of Agents; Section 2: Authority of Agents. For the full text of PICC with commentary, see *UNIDROIT Principles of International Commercial Contracts 2004*, available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

10 On the purposes of PECL and PICC, see the preamble to PICC, and art 1:101 PECL.

11 Macgregor (n 3) paras 166-171.

Alternatively, it may be a less attractive option to the third party because the agent's financial standing is usually weaker than that of the principal. Although breach of warranty of authority is not considered in this article, its availability should at least be borne in mind.

B. INTERNATIONAL INSTRUMENTS: SCOPE

Before analysing apparent authority in detail, it is helpful to explore briefly the context of the agency rules appearing in the international instruments. Generally, the Convention is more limited than the other instruments, applying only to the international sale of goods,¹² whereas PECL and PICC govern agency in general.¹³ All three are limited to agency created by the exercise of the will of the person represented, namely the principal. PECL and PICC explicitly provide that they do not govern an agent's authority conferred by law or the authority of an agent appointed by a public or judicial authority,¹⁴ while a similar restriction can be inferred from several provisions in the Convention.¹⁵ References to the creation of agency through the "will" of the principal should not, however, be taken to indicate that the instruments are irrelevant as regards company law. This is not the case, although the position, explored in the next section, is undoubtedly complex. All three instruments consider only the external aspects of representation. In other words, they focus on the relationship between the principal or agent and the third party rather than the "internal" relationship between the principal and agent.¹⁶

12 See arts 1(1), (2) UAC. This limitation applies because the UAC is regarded as an addition to the United Nations Convention on Contracts for the International Sale of Goods, which is itself applicable only to the international sale of goods. See the preamble to the Convention, and M Evans, "Explanatory report on the Convention on Agency in the International Sale of Goods" (1984-1) *Uniform Law Review* 73 at 81.

13 Art 3:101(1) PECL; art 2.2.1(1) PICC.

14 Art 3:101(2) PECL; art 2.2.1(3) PICC.

15 For limitations in the scope of the UAC, see arts 3(1), 4. But see also art 30(1): "A Contracting State may at any time declare that it will apply the provisions of this Convention to specified cases falling outside its sphere of application."

16 Art 1(3) UAC; art 3:101(3) PECL; art 2.2.1(2) PICC. The rights and duties as between principal and agent are governed by their agreement and the applicable law which, with respect to specific types of agency relationships (such as those concerning "commercial agents"), may provide mandatory rules for the protection of the agent. See *UNIDROIT Principles* (n 9) 74. For commercial agents, see Council Directive 1986/653 OJ 1986 L382/17 on the co-ordination of the laws of member states relating to self-employed commercial agents, implemented in the UK by the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, as amended by SI 1993/3173 and SI 1998/2868.

C. INTERNATIONAL INSTRUMENTS AND COMPANY LAW

(1) The UNIDROIT Agency Convention

The Convention is inapplicable to representation in company law only where the representation is *authorised*. It may therefore apply to cases of *unauthorised* representation of companies. It is also applicable if the power of representation is not based on an authority conferred by law or by the constitutive documents of the entity concerned, i.e. if a company grants authority to act on its behalf to one of its employees other than a director.¹⁷ It can furthermore be inferred from article 15(7) of the Convention that its application is not absolutely excluded in cases of representation of legal persons yet to be incorporated: “[w]here the act has been carried out on behalf of a corporation or other legal person before its creation, ratification is effective only if allowed by the law of the State governing its creation”.

(2) PECL

So far as PECL is concerned, comment B to article 3:101¹⁸ provides that, although the powers of representation conferred upon company directors by statute are not covered, if a company grants authority to act on its behalf to an employee other than a director, PECL does apply.¹⁹ Moreover, it seems that it applies to representation of legal persons yet to be incorporated. This is evident from comment B to article 3:207²⁰ which uses the example of an agent who acts in the name of a company not yet created to illustrate that in such a case the principal is bound as a result of ratification as from the moment at which it came into existence. Comment B makes it clear that special rules of the applicable company law with respect to pre-incorporation contracts take precedence over the terms of PECL.²¹

(3) PICC

In PICC, comment 5 to article 2.2.1²² states that if, under the special rules governing the authority of its bodies or officers, a corporation is prevented from invoking a limitation to its authority against third parties, that corporation may not rely on article 2.2.5(1)²³ to claim that it is not bound by an act of its bodies or officers

17 See art 4(a) UAC: “an organ, officer or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, shall not be regarded as the agent of that entity in so far as, in the exercise of his functions as such, he acts by virtue of an authority conferred by law or by the constitutive documents of that entity”. See also Busch, *Indirect Representation* (n 4) 179 n 20.

18 “Scope of the Chapter”.

19 Lando & Beale, *Principles of European Contract Law* (n 7) 197-198.

20 “Ratification by Principal”.

21 Lando & Beale, *Principles of European Contract Law* (n 7) 214.

22 “Scope of the Section”.

23 This provides that where an agent acts without authority or exceeds its authority, its acts do not affect the legal relations between the principal and the third party.

that falls outside the scope of their authority. On the other hand (as comment 5 continues), as long as the general rules laid down in the agency section do not conflict with the special rules on the authority of bodies, officers or partners, they may be applied in lieu of the latter. Thus, for instance, a third party seeking to demonstrate that the contract it has concluded with an officer of a corporation binds that corporation may invoke either the special rules governing the authority of that corporation's bodies or officers, or, as the case may be, the general rules on apparent authority laid down in article 2.2.5(2).²⁴ Unlike the Convention and PECL, PICC does not address the question of representation of legal persons prior to incorporation, but silence may indicate that it applies in such cases, subject to the restriction that the applicable company law takes precedence.

(4) UK company law

The effect of the First Directive on Company Law should be noted here.²⁵ This directive is currently implemented in the UK by sections 35, 35A and 35B of the Companies Act 1985,²⁶ which protect third parties "dealing with"²⁷ a company in good faith from limitations on the power of the representative of the company. The definition of good faith contained within the UK legislation is complex. A person will be presumed to be acting in good faith,²⁸ and will not be regarded as acting in bad faith by reason only that he knows that the act is beyond the powers of the directors.²⁹ Reynolds suggests that the word "only" is intended to distinguish situations where the directors are exceeding their authority from those where they are actually abusing it:³⁰

In the first situation mere knowledge of this fact will not result in a person dealing with the company being unable to enforce his transaction; and this goes further than the normal rules of apparent authority. But where he knows or is to be taken to know that the directors are abusing their authority, there will be no such protection.

Agents acting on behalf of companies not yet incorporated are subject to relatively strict rules which prevent the creation of a contract with an unincor-

²⁴ *UNIDROIT Principles* (n 9) 75-76.

²⁵ First Council Directive 1968/151 OJ 1968 L065/8-12.

²⁶ These sections will be re-enacted with minor amendments by the Companies Act 2006 ss 39, 40 and 41. The Government anticipates that these provisions will be in force by October 2008.

²⁷ For the definition of this phrase, see Companies Act 1985 s 35A(2)(a) (Companies Act 2006 s 40(2)).

²⁸ Companies Act 1985 s 35A(2)(c) (Companies Act 2006 s 40(2)(b)(ii)).

²⁹ Companies Act 1985 s 35A(2)(b) (Companies Act 2006 s 40(2)(b)(iii)). A person acts in good faith if he acts genuinely and honestly in the circumstances: see *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] BCLC 1 at 18 per Nourse J (on the predecessor of s 35).

³⁰ See F M B Reynolds, *Bowstead & Reynolds on Agency*, 18th edn (2006) para 8-038.

porated company.³¹ Any agent who purports to do so will not bind his principal, but will rather be personally bound by the contract. The company, once formed, is not bound by such contracts and cannot ratify them. In order to create a legally enforceable relationship with the third party, the company would have to enter into a new contract.³²

D. DIRECT AND INDIRECT AGENCY

Civil Law jurisdictions apply a distinction between direct and indirect agency which is not present in Common Law systems. The distinction depends on whether or not the agent discloses when he concludes the contract that he is acting in the name of the principal. If he does so, this is direct representation, the effect of which is the formation of a contract between principal and third party. Where the agent acts in his own name – but still on behalf of the principal in the sense that the transaction is ultimately at the risk and for the benefit of the principal – this is indirect representation, the effect of which is the formation of a contract between agent and third party. In indirect representation, this outcome applies even where the third party is aware that the agent is acting on behalf (though not in the name) of a principal.

The distinction between direct and indirect agency is not found in either the Convention or in PICC. The Convention applies where “one person, the agent, has authority or purports to have authority on behalf of another person, the principal, to conclude a contract of sale of goods with a third party.”³³ Article 1(4) makes it clear that the Convention applies irrespective of whether the agent acts in his own name or in that of the principal.³⁴ In similar vein, article 2.2.1(1) of PICC states that its section on agency “governs the authority of a person (‘the agent’) to affect the legal relations of another person (‘the principal’) by or with respect to a contract with a third party, whether the agent acts in its own name or in that of the principal.”³⁵ By contrast, PECL adopts the traditional Civilian distinction between direct and indirect representation, although its presence is somewhat misleading.³⁶ Importantly, PECL contains provisions which permit direct actions between principal and third party even where the agent acted in his own name.³⁷

31 Companies Act 1985 s 36C(1) (Companies Act 2006 s 51(1)). This section implements art 7 of the First Company Law Directive 1968/151.

32 S Mayson, D French and C Ryan, *Mayson, French and Ryan on Company Law*, 23rd edn (2007) 754.

33 Art 1(1) UAC.

34 See Busch, *Indirect Representation* (n 4) 180-181.

35 See also *UNIDROIT Principles* (n 9) 75.

36 Art 3:102 PECL. See Lando & Beale, *Principles of European Contract Law* (n 7) 199-200; Busch, *Indirect Representation* (n 4) 211 ff.

37 Arts 3:301-3:304 PECL.

Such actions are wide in scope, and, as a result, the main legal consequence which would normally be implied by the use of the term “indirect agency” does not apply under PECL.

Although Scots law does not recognise indirect agency as a legal concept, it does apply different legal consequences depending upon whether or not the agent acts in his own name. While the norm is disclosed agency, the agent may disclose only the existence and not the identity of his principal (i.e. acting for an unnamed principal). The legal effect is uncertain.³⁸ Alternatively, the agent may act as though he were the actual principal, failing to disclose even the fact of agency (i.e. acting for an undisclosed principal).³⁹ Although this final possibility may seem to resemble indirect agency, the legal effect is the opposite. In Scots law the principal and the third party have a largely unqualified right to “intervene” on a contract formed in this way in order to make use of all normal contractual remedies.

Indirect representation, although highly important in Civilian systems, does not fall within the ambit of this article. Although it is possible to apply the concept of apparent authority to certain cases of what may be called “unauthorised indirect representation”⁴⁰ the focus of attention here is on direct rather than indirect representation.

Direct representation is defined in very similar ways in the three international instruments, the definitions in the Convention and PICC being almost identical. Essentially, it occurs where the agent enters into contracts in the name of the principal and possesses the necessary authority to do so.⁴¹

E. TYPES OF AUTHORITY

Apparent authority is, of course, only the appearance of authority. To the third party, the agent appears to be authorised, even though he is not. As the agent has no “real” authority, he cannot, therefore, conclude a contract on the principal’s behalf. Nevertheless, apparent authority has a close, and sometimes confusing, relationship with the different types of “real” authority which may exist.

The major types of “real” authority can be identified relatively easily. The

38 Macgregor (n 3) paras 137-146. In PECL, there is a specific rule for this situation in art 3:203 (Unidentified Principal): “If an agent enters into a contract in the name of a principal whose identity is to be revealed later, but fails to reveal that identity within a reasonable time after a request by the third party, the agent itself is bound by the contract.”

39 Macgregor (n 3) paras 147-164.

40 On “unauthorised indirect representation” and “apparent authority for indirect representation”, see Busch, *Indirect Representation* (n 4) 232 ff, 235 ff respectively.

41 See art 12 UAC (on which see Busch, *Indirect Representation* (n 4) 181-182, with further references); art 2.2.3(1) PICC (on which see *UNIDROIT Principles* (n 9) 78-80; Bonell (n 4) at 387-390); art 3:102(1) PECL (on which see Bonell (n 4) at 387; Busch, *Indirect Representation* (n 4) 211-212).

agent may have express authority, which is authority expressly granted either in a written contract or orally. Alternatively, he may have implied authority, which may arise in different ways. It may arise because it is necessary to carry out the object of the agency agreement, because it is incidental to it, or because it is customary in the particular trade in question. It may be implied in the sense that it is *usual*, meaning that it arises as an implication from the post the agent holds, e.g. a solicitor benefits from the authority which it would be usual for someone in that profession to have.⁴² As a type of implied authority, usual authority constitutes “real” authority: it allows the agent to conclude a contract on his principal’s behalf. It will be referred to here as “implied usual authority”.

The term “usual authority” may have two further meanings, the implications of which have been considered in English but not in Scots law.

In order to understand the first such meaning, one must consider the situation of an agent who has been appointed to a particular post. One would expect him to possess the authority which is usual for those in such a post to have. However, one must further imagine that the principal has expressly prohibited the specific task which the agent has purported to carry out. This express prohibition rules out the possibility of any implied usual authority: authority cannot be implied in the face of an express prohibition. As a result, the only way in which the third party can be protected is through the operation of apparent authority. Such a situation, however, poses challenges for apparent authority reasoning. Apparent authority rests on a representation by the principal. Here, the representation is very weak, consisting of the simple placing of the agent in the particular post. Arguably, this makes it more difficult for the third party to invoke the concept of apparent authority.⁴³ As is explored later,⁴⁴ the adoption of what is known as the “risk principle” might make it easier for a third party to succeed in the use of apparent authority in such cases. But even if the third party succeeds in overcoming this hurdle, it should be recalled that usual authority of this type is not “real” authority. The agent remains unauthorised and unable to conclude a contract on the principal’s behalf. The third party’s remedy lies in the operation of apparent authority as a type of personal bar.

There is little evidence of usage of the term “usual authority” in Scots law, whether as implied usual authority or in the apparent authority context just discussed. It is,

42 Macgregor (n 3) para 50.

43 But see the references to “usual authority” in the judgment of Steyn LJ in *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd’s Rep 194 at 201, where the concept of a representation by the principal is stretched to its limits. Cf *Pacific Carriers Ltd v BNP Paribas* (2004) 208 ALR 213 at 226 (a judgment of the full court), on which see G H L Fridman, “Variations on the theme of authority” (2006) 22 *Journal of Contract Law* 105 at 112 ff.

44 See G.(1) below. The risk principle places less reliance on a representation by the principal.

however, important to note the Scottish usage of the terms “general” and “special” or “limited” agent.⁴⁵ A “general” agent is one who is employed to carry out all of the business of the principal of a particular type, whereas a “special” agent is employed to carry out a single transaction. Only the general agent can benefit from apparent authority.⁴⁶

The second further meaning of “usual authority” is much less important for the purposes of this article and so will only be briefly noted. It has been suggested by Reynolds that “usual authority” is a concept in its own right, independent of implied authority and apparent authority.⁴⁷ The implications of this suggestion are not considered here, usual authority being relevant only to the extent necessary to understand apparent authority.

F. APPARENT AUTHORITY

(1) Historical development in Scotland

The Scottish concept of apparent authority is elusive, and one is more likely to find use of the classic definition from English law, provided by Lord Diplock in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*:⁴⁸

a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the “apparent” authority, so as to render the principal liable to perform any obligations imposed on him by such a contract.

For the moment, the actual terms of this definition are not the focus of attention, but rather the use of English rather than Scots authority. This is perhaps not surprising given the lack of a detailed treatment in Scots law. The institutional writers provide a wealth of analysis of mandate, the gratuitous relationship which was, in many ways, the source of the principles of the non-gratuitous concept of agency. However, apparent authority developed a good deal later than the time at which the institutional writers published their works. The principles of the common law of agency (as opposed to mandate) are a relatively recent development. Stoljar noted that they were not fully formulated until the turn of

45 Gloag, *Contract* (n 2) 150; Macgregor (n 3) paras 55-56.

46 Gloag, *Contract* (n 2) 150.

47 See, in particular, the explanation of the infamous English case of *Watteau v Fenwick* [1893] 1 QB 346 in *Bowstead & Reynolds on Agency* (n 30) para 3-006 (iii); cf Busch, *Indirect Representation* (n 4) 132, 135-136.

48 [1964] 2 QB 480 at 503. See most recently *Ben Cleuch Estates Ltd v Scottish Enterprise* [2006] CSOH 35, 2006 GWD 8-154 at para 127 per Lord Reed, adopting the opinion of Lord Cullen in *Capital Land Holdings Ltd v Secretary of State for the Environment* 28 July 1995, Court of Session Outer House.

the nineteenth century.⁴⁹ In relation to apparent authority in particular, Atiyah traced a major shift in its legal basis during the nineteenth century.⁵⁰ According to Atiyah, it moved from liability of the principal based on the fact that he is the major beneficiary of the use of agents to liability on the basis of his will, agreement or authority. Apparent authority was clearly still in the process of development during the nineteenth century.

This is not to say that there are no relevant Scottish authorities during this period. There are cases from the eighteenth and early nineteenth centuries in which principals were held liable for unauthorised actions of “agents” in situations resembling those which would be classed as apparent authority in a modern context. Such cases are, however, properly regarded as examples of mandate, involving representation of a “paterfamilias” by his wife,⁵¹ a family member⁵² or servants.⁵³ They have not been cited in modern commercial cases, and this is probably correct. All involve very close domestic relationships, so that mandant and mandatar are, in effect, merged into a single legal person. It is doubtful whether commercial agency is sufficiently analogous for the precedents to be relevant. Also the reports contain very little analysis rendering them of little use as precedents.

During the nineteenth century there are a number of relevant decisions, although the terms “ostensible” and “apparent” authority tend not to be used.⁵⁴ Often the case is resolved by reference to the concept of homologation,⁵⁵ which, in this context, can be defined as knowledge and acquiescence by the principal of a course of conduct by the agent. Homologation was recently identified by Elspeth Reid as both a forerunner and a component part of personal bar.⁵⁶ It was used most notably by the Second Division in *International Sponge Importers v Watt and Sons*,⁵⁷ a case which is explored below and which eventually progressed to the

49 See Stoljar, *Agency* (n 1) 3, 14.

50 P S Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 496 ff.

51 Gloag contrasts Scots law on this point with English law: see *Contract* (n 2) 147 n 6, referring to *Debenham v Mellon* [1880] 6 App Cas 24.

52 *Knox v Hay* (1813) Hume 351; *Ferguson & Lillie v Stephen* (1864) 2 M 804.

53 *Oliver v Grieve* (1792) Hume 319; *Inches v Elder* (1793) Hume 322; *Dewar v Nairne* (1804) Hume 340; *Mortimer v Hamilton* (1868) 7 M 158.

54 Aside from the mandate cases mentioned at nn 52 and 53 above, other notable examples (including those from a later period) are *The North of Scotland Banking Company v Behn, Möller, & Co* (1881) 8 R 423; *Thomas Hayman & Sons v The American Cotton Oil Co* (1907) 45 SLR 207; *British Bata Shoe Co v Double M Shah Ltd* 1980 SC 311; *Dornier GmbH v Cannon* 1991 SC 310; *Bank of Scotland v Brunswick Developments (1987) Ltd (No 2)* 1997 SC 226. Only in the more recent cases is it possible to find the terms “apparent authority” and “ostensible authority”.

55 *Swinburne and Company v The Western Bank of Scotland* (1856) 18 D 1025; *Finlayson v The Braidbar Quarry Co* (1864) 2 M 1297 at 1303 per Lord Benholme; *Colvin v Dixon* (1867) 5 M 603 at 609-610 per Lord Curriehill. See also A C Black, “Principal and Agent”, in *Greens Encyclopaedia of the Law of Scotland*, 2nd edn, vol 9 (1913) 461.

56 E Reid, “Personal bar: case-law in search of principle” (2003) 7 EdinLR 340 at 341.

57 1911 SC (HL) 57 at 68 per Lord Ardwall, 61 per Lord Low.

House of Lords. Unfortunately, the judges in the House of Lords did not share the view of the Second Division on the importance of homologation. In more recent cases the courts have tended to rely on English precedents and not on Scottish ones. In general, Lord Diplock's *locus classicus* is used.

The current state of the law can be illustrated by reference to the approach of Lord Rodger in *Bank of Scotland v Brunswick Developments (1987) Ltd (No 2)*.⁵⁸ Referring to what was, in that particular case, agreed between the parties, he explained that apparent authority is "... in both systems ... built on the doctrine which is known as estoppel in English law and personal bar in Scots law."⁵⁹ At this point, almost invariably, legal analysis stops. This may, of course, be due to the failure of counsel to cite the relevant cases. If so, this is not because of a lack of case law – reference to Rankine's *Personal Bar* confirms that this is certainly not so.⁶⁰ However, Rankine's work is more a collection of cases than a systematic treatment of the same, and Scots lawyers have had to wait until recent times for a systematic treatment to appear, in the form of two articles by Elspeth Reid⁶¹ followed by a full-length book by Reid and John Blackie.⁶² As a result, Scots law currently contains little judicial analysis of apparent authority. The task which the authors have set themselves in this article therefore takes place at least partially in the realms of conjecture. Conclusions are based on specific facts in cases which are either emphasised by the judiciary or at least used by them to reach their conclusions.

(2) Adoption of estoppel by representation?

In the face of this lack of authority, it might be asked why Scots lawyers do not simply adopt the principles of English estoppel by representation. Scots lawyers should consider their responses to this question carefully, lest motives based on national protectionism be permitted to dominate. Plainly, there are advantages in the adoption in Scotland of the English rules. Perhaps most importantly, it would achieve uniformity of agency principles throughout the UK. The influence which English agency principles have achieved throughout the Common Law should be

58 1997 SC 226 at 234.

59 1997 SC 226 at 234 per Lord President Rodger. It should be noted that, in England, there is much argument as to whether or not apparent authority should be regarded as based on estoppel. The main difficulties with the estoppel approach are (i) the representation giving rise to the estoppel is, in this area, permitted to be very general, and (ii) the detriment incurred by the representee may be small. Arguably, apparent authority has become a doctrine in its own right: see *Bowstead & Reynolds on Agency* (n 30) para 8-029.

60 J Rankine, *A Treatise on the Law of Personal Bar in Scotland* (1921).

61 Reid (n 56); E Reid, "Acquiescence in the air: *William Grant v Glen Catrine Bonded Ware*" 2001 JR 191 at 193.

62 E C Reid and J W G Blackie, *Personal Bar* (2006).

borne in mind here. Practising lawyers might question the benefit in the development of distinctive Scots principles which are somewhat obscure and could lead to differences north and south of the border. In essence, the question can be bluntly stated as: “Why bother?”

In fact there are sound reasons why Scots law should not be assimilated with English law in this area. Now that academic analysis of personal bar is available, the differences between the Scottish concept and English estoppel by representation have become clear. One particularly fundamental difference is the unitary nature of personal bar compared with the fragmented structure of estoppels in English law. One is reminded of Lord Clarke’s words cautioning against the assimilation of the Scots and English concepts:⁶³

the former sharp distinction between law and equity in England, and the doctrine of consideration in that jurisdiction, have meant that the development of the law of estoppel has proceeded, from time to time, on different lines from that of personal bar in Scotland.

This being the case, it is unlikely that estoppel by representation would fit well into the underlying structure of Scots law. Now would also be a curious time to assimilate Scots and English law, when the major harmonisation project in contract law, the Common Frame of Reference, emanates from the European Union. Why opt for a Common Law solution when the main European initiative will, inevitably, be more Civilian in nature? In summary, there seems no pressing reason to adopt estoppel by representation, and there are potentially significant pitfalls inherent in doing so.

(3) The international instruments

At this point it is helpful to look to the equivalent terms of the international instruments. All three versions, which are relatively similar, are quoted here in full and are analysed throughout the remainder of this article.

The UNIDROIT Agency Convention provides in article 14(2) that:

... where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

Article 3:201(3) of PECL states that:

⁶³ *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd* 2001 SC 901 at 944 where Lord Clarke approves Lord Keith in *Armia v Daejan Developments Ltd* 1979 SC (HL) 56 at 72; also Lord President Rodger at 915. See further Reid (n 61) at 193.

... a person is to be treated as having granted authority to an apparent agent if the person's statements or conduct induce the third party reasonably and in good faith to believe that the apparent agent has been granted authority for the act performed by it.

Finally, article 2.2.5(2) of PICC states that:

... where the principal causes the third party reasonably to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

(4) Doctrinal basis

In his discussion of apparent authority, Gloag stated that "any general theory is difficult to find or apply."⁶⁴ The work carried out by Reid and Blackie provides valuable assistance in this exercise. They indicate that personal bar "penalises inconsistent conduct."⁶⁵ A similar legal basis can be found in PICC⁶⁶ where apparent authority is said to be part of the express prohibition against inconsistent behaviour,⁶⁷ as well as an application of the general principle of good faith.⁶⁸ Less information as to doctrinal basis is provided in the explanatory comments to the other instruments, but, in view of the similarity in the wording of all three versions, their doctrinal basis is unlikely to differ markedly.⁶⁹

The references to good faith and the prevention of inconsistent behaviour may suggest an underlying purpose of protection of the reasonable expectations of the third party. It is consistent with this protective aim that, in two of the international instruments, the third party is *entitled* to invoke apparent authority but not *obliged* to do so.⁷⁰ Is it similarly the case under Scots law that the third party could refuse to invoke apparent authority? This, again, is a question of personal bar, applied this time to the third party's conduct. Although this anticipates the discussion of the requirements of personal bar, below,⁷¹ it can be stated that the third party is unlikely to be barred from refusal because no element of unfairness

64 Gloag, *Contract* (n 2) 147.

65 Reid & Blackie, *Personal Bar* (n 62) para 2-01.

66 Art 2.2.5(1) PICC; *UNIDROIT Principles* (n 9) 83-84 (comment 2).

67 Art 1.8 PICC states: "A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment."

68 Art 1.7 PICC states "(1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty."

69 See with respect to the UAC, M J Bonell, "The 1983 Geneva Convention on Agency in the International Sale of Goods" (1984) 32 *American Journal of Comparative Law* 717 at 739-740.

70 With respect to the UAC, see Bonell (n 69) at 740; H A Stöcker, "Das Genfer Übereinkommen über die Vertretung beim internationalen Warenkauf" 1983 *Wertpapier-Mitteilungen* 778 at 783. With respect to art 2.2.5(2) PICC, see F M B Reynolds, "Authority of agents" 2005 *ICC International Court of Arbitration Bulletin*, Special Supplement, *UNIDROIT Principles: New Developments and Applications* 13.

71 See G. below.

exists. The third party is the victim, not the party seeking to take unfair advantage of the situation.

The position appears to be different under PECL. It is stated there that “a person [i.e. the principal] is to be treated as having granted authority.”⁷² Thus, one is asked to assume that full authority exists. Where apparent authority operates under PECL, a valid contract exists – a fact which none of the three parties can deny. The third party is bound by this contract. Scots law, therefore, appears to permit conduct by the third party which PECL would not permit. In fact, the result under PECL is probably not as unfair to the third party as it might at first appear. He is, of course, only being held to the contract which he freely entered into.

(5) Scope

In discussing the scope of the apparent authority rules in the international instruments, the scope of the instruments as a whole should be borne in mind – for example, the limitation of the UNIDROIT Agency Convention to the international sale of goods.⁷³ In fact the apparent authority rules extend further than might have been anticipated. This is because of the existence of special rules which apply where the agent’s (actual) authority is terminated by events such as the death, mental incapacity or bankruptcy of the principal. The “appearance” of authority which is the essence of apparent authority may continue notwithstanding the event which has terminated the agent’s authority. All three international instruments contain special rules governing these situations. The Convention and PICC both provide that termination does not affect the third party unless he knew or ought to have known of it.⁷⁴ Furthermore, in both instruments the agent remains authorised, notwithstanding termination, to perform on behalf of the principal (or, in the Convention, the principal and successors) those acts that are necessary to prevent damage to its interests.⁷⁵ The comments in PICC indicate that the same rule applies, with appropriate modifications, to subsequent restrictions of an agent’s authority.⁷⁶

The provisions in PECL are similar if more elaborate.⁷⁷ Article 3:209(1) provides that an agent’s authority continues until the third party knows or ought to know that (a) the agent’s authority has been brought to an end by the principal, the agent, or both; or (b) the acts for which the authority had been granted have been completed, or the time for which it had been granted has expired; or (c) the agent

⁷² Art 3:201(3) PECL.

⁷³ See the discussion on scope in B. above.

⁷⁴ Art 19 UAC; art 2.2.10(1) PICC.

⁷⁵ Art 20 UAC; art 2.2.10(2) PICC.

⁷⁶ *UNIDROIT Principles* (n 9) 93 (comment 4 to art 2.2.10).

⁷⁷ Art 3:209 PECL.

has become insolvent or, where a natural person, has died or become incapacitated; or (d) the principal has become insolvent. Where the principal has brought the authority to an end⁷⁸ the third party is considered to be aware of this if it has been communicated or publicised in the same manner in which the authority was originally communicated or publicised.⁷⁹ Finally, the agent's authority is continued for a reasonable time to allow him to perform those acts which are necessary to protect the interests of the principal or its successors.⁸⁰

The Scottish principles on this same issue of the scope of the agent's apparent authority were formed at an early stage, bearing in mind the relative modernity of the law of agency as a whole. They are explored in the works of Stair and Erskine, and in one particular case: *Pollok v Paterson*.⁸¹ This valuable case was decided by a bench of five judges of the Second Division in 1811. Looking firstly at the views of Stair and Erskine, in the context of mandate,⁸² the judges note the general rule, that the relationship of mandate terminates on the death of either party,⁸³ before citing two exceptions. First, the mandatar/agent is entitled to complete any partially performed transactions notwithstanding the death of the mandant/principal. Secondly, an exception "*bonae fidei*" exists, which permits the mandatar to carry out transactions where he is unaware of the mandant's death, whether or not those transactions have commenced at the time of death.⁸⁴ The analysis can be fleshed out by reference to *Pollok v Paterson* itself.⁸⁵ In this case, which concerned the mental incapacity and eventual sequestration of the principal, Lord Meadowbank explained why the particular event which terminated the agency relationship did not act to terminate the agent's authority: "Once given, the mandate continues *sua natura*, and does not require a continuation of mental exertion or approbation."⁸⁶ He confirmed that third parties dealing with the mandatar were protected, provided that they acted in good faith.⁸⁷ Roman and Civilian authorities were discussed and clearly had an impact on the outcome.⁸⁸

78 Art 3:209(1)(a) PECL.

79 Art 3:209(2) PECL.

80 Art 3:209(3) PECL. Cf Bonell (n 4) at 396 where he criticises the more elaborate approach of PECL on the basis that it both admits circumstances as grounds for termination which are not recognised as such at a domestic level and excludes others which do operate at a domestic level.

81 10 Dec 1811 FC (369). The case concerned the mental incapacity and eventual sequestration of the principal.

82 Stair, *Inst* 1.12.6; Erskine, *Inst* 3.3.41.

83 Stair, *Inst* 1.12.6: "...for this contract arising from a singular affection or friendship betwixt both, the removal of either resolves that tie."

84 Erskine and Stair cite J Inst 3.26.10 in support of the exceptions. Erskine also cites D 14.3.17.2-3.

85 10 Dec 1811 FC (369).

86 At 376.

87 At 377.

88 At 377 per Lord Meadowbank, 382 per Lord Justice Clerk Boyle. Both indicate that they are relying on Roman sources but without identifying them. They are probably referring to the same passage of the

Cases post-dating the works of the institutional writers support the proposition that the agent's authority continues in situations of mental incapacity⁸⁹ or death.⁹⁰ Bankruptcy may, however, be a special case. Although the judgments in *Pollok v Paterson* suggest that the agent's authority may be continued beyond bankruptcy of the principal, this rule is probably superseded by modern bankruptcy legislation, for it seems unlikely that the agent's authority survives in the face of the vesting of the insolvent party's goods in the trustee in bankruptcy. The position under PECL is different: the agent remains authorised until the third party knows or ought to know that the principal is insolvent.⁹¹

Finally, it should be noted that, in Scots law, notification of the cessation of the agent's authority must be direct where a course of dealing exists, but can be by advertisement where no such course exists.⁹²

This discussion of termination of the agent's authority reveals close similarities between Scots law and the international codes. This may not be surprising given that there has been little, if any, English influence on Scots law in this area.

(6) Effect

The nature of apparent authority as an application of personal bar has an important impact on its effect. As already noted, apparent authority bars or prevents the principal from pleading the agent's lack of authority in any issue with the third party. Being in essence procedural in nature, it is unlikely to have any stronger, "constitutive" effect which would allow it to create a contract where none otherwise existed.⁹³ This issue can be important. Logically, if no contract exists, specific implement cannot be competent. The authors have, however, been unable to find judicial confirmation of this point. The position in English law seems similarly unclear. Certainly, in English law, the principal has no right to sue the third party without first ratifying the agent's actings, and this would tend to support the conclusion that no contract exists.⁹⁴ However, Powell suggests that the law

Digest relied on by Erskine (D 14.3.17.2-3). Counsel for the pursuer cited the discussion of this passage by both Pothier and Voet. See R J Pothier, *Treatise on the Law of Obligations* (transl W D Evans, 1806) para 448; J Voet, *Commentarius ad Pandectas* (1707) 14.3.3; 17.1. 15.

89 *Pollok v Paterson* 10 Dec 1811 FC (369); *Wink v Mortimer* (1849) 11 D 995.

90 *Campbell v Anderson* (1829) 3 W & S 384. In a short speech in the House of Lords, Lord Lyndhurst LC (at 389) described the case as a "...question of bona fides."

91 Art 3:209(1)(d) PECL.

92 See, generally, Macgregor (n 3) para 81.

93 See Rankine, *Personal Bar* (n 60) 1, where he describes the doctrine as a "parcel of the law of evidence". There is a similar statement in G Spencer Bower, *The Law relating to Estoppel by Representation*, 4th edn, by P Feltham, D Hochberg and T Leech (2004) V.6.1. Reid (n 56) at 345 also notes that it "suppresses rights rather than creates them".

94 *Boustead & Reynolds on Agency* (n 30) para 8-031. But raising an action of specific performance would probably amount to implied ratification by the principal: see Bonell (n 4) at 387.

“presumes” a contract,⁹⁵ and Fridman, and perhaps Reynolds also, agree.⁹⁶ The moves towards the harmonisation of contract law at a European level also raise the profile of the remedy of specific implement, given its central role in continental Civilian systems.⁹⁷ Thus it remains important to assess whether it is available to the third party in Scots law.

The uncertainty on this point renders the terms of the international instruments of particular interest. Apparent authority emerges as the exception to the normal rule that an agent acting beyond the confines of his authority fails to create a binding contract between principal and third party.⁹⁸ Where apparent authority operates in PECL, the principal “is to be treated as having granted authority”,⁹⁹ thus deeming the principal to have granted full authority to the agent. This approach can be contrasted with PICC and the UNIDROIT Agency Convention where the equivalent provisions are phrased in the same way as an estoppel or bar: “the principal may not invoke against the third party the lack of authority of the agent.”¹⁰⁰ Thus, only under PECL may both principal and third party sue in the case of apparent authority. This high level of protection is beneficial, not only to the third party, but also to so-called “fourth parties” – those acquiring rights, both real and personal, from third parties.

PECL’s solution seems preferable.¹⁰¹ Both principal and third party ought to have rights of enforcement of the “contract” created through the use of apparent authority. Having been misled as to the realities of the situation, the third party certainly ought to have such rights. The principal may be able to avoid the question altogether, for it will probably be easier to ratify rather than to enforce the contract. This being the case, it is only a small step to grant him a right of enforcement. Although this is the ideal solution, the conceptual difficulties cannot be ignored. It is difficult to explain how an agent lacking authority may conclude a contract. Through the use of its “deeming” provision PECL has simply avoided the question.

The protection of fourth parties was mentioned briefly above. Similar protections exist in UK law, at least in the context of sale of goods, applying to *bona*

95 R Powell, *Law of Agency*, 2nd edn (1961) 70.

96 G H L Fridman, *The Law of Agency*, 7th edn (1996) 121; *Bowstead & Reynolds on Agency* (n 30) para 8-031 (referring to “a contract”). See also Spencer Bower, *Estoppel by Representation* (n 93) V.6.1.

97 See H Beale, A Hartkamp, H Kötz and D Tallon, *Cases, Materials and Text on Contract Law* (2001) para 6.2.

98 Art 14(1) UAC; art 3:204(1) PECL; art 2.2.5(1) PICC.

99 Art 3:201(3) PECL.

100 Art 14(2) UAC; art 2.2.5(2) PICC.

101 Cf UNIDROIT 1999, Study L – Doc. 63/Add.1 (<http://www.unidroit.org/english/publications/proceedings/1999/study/50/s-50-63add1-e.pdf>), containing the comments of Deborah DeMott, who (together with Francis Reynolds) acted as external expert in relation to the agency section in PICC: “Why should T be able to hold P but P not be able to hold T?”

fide third parties who purchase from mercantile agents acting for buyers or from sellers in possession of goods without title to the same,¹⁰² or from mercantile agents generally.¹⁰³ Such protections are more limited in nature than the position under PECL explored immediately above.

G. THE REQUIREMENTS FOR APPARENT AUTHORITY

(1) The principal's conduct and the risk principle

Like the three international instruments, Scots law has – at least formally – adopted the classical “of the principal’s own doing” idea¹⁰⁴ by which apparent authority must be traced back to an act or omission of the principal.¹⁰⁵ However, as in Dutch law, it is possible to move beyond the principal’s conduct as the sole touchstone of liability. Other relevant factors might include the position occupied by the apparent agent in an organisation’s hierarchy, or the non-transparent structure of a company, or the type of transaction involved. While it is difficult to describe such factors as “conduct” of the principal, there is a feeling that they ought to come within the ambit of the risks which the principal bears. Taking into account such factors has been described as adoption of the “risk principle”, in the sense that they are matters which lie within the principal’s sphere of risk.

(a) Scots law

In common with other forms of estoppel-based reasoning, Reid and Blackie’s analysis rests on the conduct of the principal. Their framework begins with the identification of a pre-existing right: “A person claims to have a right, the exercise of which the obligant alleges is barred.”¹⁰⁶ Thus for present purposes the principal (referred to as the “rightholder” in Reid and Blackie’s scheme) may be barred from asserting against the third party (the obligant) the “right” to plead the agent’s lack of authority in an action raised by the third party. Reid and Blackie then proceed to analyse the principal’s conduct. Whereas Common Law systems use “representation” for this purpose,¹⁰⁷ Reid and Blackie use “inconsistency”. This they break down into four parts.¹⁰⁸

102 Sale of Goods Act 1979 ss 24, 25.

103 Factors (Scotland) Act 1890 s 1, applying the Factors Act 1889 to Scotland.

104 The authors apologise for this cumbersome expression, translated from the Dutch word *toedoenbeginsel*. “Conduct” fails to encompass inaction and is therefore not appropriate.

105 The central role of the principal’s conduct is illustrated by cases such as *British Bata Shoe Co v Double M Shah Ltd* 1980 SC 311 and *Dornier GmbH v Cannon* 1991 SC 310.

106 Reid & Blackie, *Personal Bar* (n 62) paras 2-04–2-06.

107 See, for example, English or South African law, but notably not the American Law Institute, *Restatement (Third) of Agency* (2006) §1.03, which uses a wider notion of “manifestation”.

108 Reid & Blackie, *Personal Bar* (n 62) paras 2-04–2-39.

The first requirement is that: “To the obligant’s knowledge, the rightholder has behaved in a way which was inconsistent with the exercise of the right.”¹⁰⁹ Applied to apparent authority, this means that the principal, to the third party’s knowledge, has behaved in a way which is inconsistent with the exercise of his right to plead the agent’s lack of authority in an action raised by the third party. Reid and Blackie confirm that silence may amount to “behaviour”,¹¹⁰ and this is consistent with the case law on apparent authority.¹¹¹ The standard text-book examples of apparent authority do indeed involve inaction, for example where the principal has limited or withdrawn the agent’s authority but has failed to notify business associates.¹¹²

The second requirement is that: “At the time of so behaving, the rightholder knew about the right.”¹¹³ This means that the principal must be aware of the agent’s lack of authority at the time when the principal’s “behaviour” took place.

The third requirement is that: “Nonetheless the rightholder now seeks to exercise the right.”¹¹⁴ The principal attempts, in the context of an action raised by the third party, to plead the agent’s lack of authority.

Finally, the fourth requirement is that: “Its exercise will affect the obligant.”¹¹⁵ To permit the principal to assert the agent’s lack of authority would be to deny the third party his normal remedies for breach of contract.

Reid and Blackie’s framework for personal bar can readily be applied to apparent authority. A different question is whether there is evidence in the Scottish case law of a movement beyond personal bar alone and towards adoption of the risk principle. Certainly the importance of the principal’s conduct is usually emphasised,¹¹⁶ but *International Sponge Importers v Watt and Sons*,¹¹⁷ a decision of the House of Lords, may provide limited support for going further. The facts involved a travelling agent who sold sponges on behalf of the principal. Payment

109 Reid & Blackie, *Personal Bar* (n 62) paras 2-07–2-27.

110 Reid & Blackie, *Personal Bar* (n 62) para 2-22.

111 See *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 503 per Diplock LJ, approved by Lord President Hope in *Dornier GmbH v Cannon* 1991 SC 310 at 314, and by Lord Macfadyen in *John Davidson (Pipes) Ltd v First Engineering Ltd* 2001 SCLR 73 at 78.

112 See W M Gloag and R C Henderson, *The Law of Scotland*, 11th edn, by L J Dunlop et al (2001) paras 21.28–21.29; F Davidson and L Macgregor, *Commercial Law in Scotland* (2003) 58. See also Gloag, *Contract* (n 2) 147 (citing Bell, *Prin* § 288); *The North of Scotland Banking Company v Behn, Möller, & Co* (1881) 8 R 423. The Partnership Act 1890 s 36 is, in effect, this principle in statutory form.

113 Reid & Blackie, *Personal Bar* (n 62) paras 2-28–2-37.

114 Reid & Blackie, *Personal Bar* (n 62) para 2-38.

115 Reid & Blackie, *Personal Bar* (n 62) para 2-39.

116 *British Bata Shoe Co v Double M Shah Ltd* 1980 SC 311 at 316–318 per Lord Jauncey; *Thomas Hayman & Sons v The American Cotton Oil Co* (1907) 45 SLR 207 at 212 per Lord Justice Clerk Macdonald; *Dornier GmbH v Cannon* 1991 SC 310 at 314 per Lord President Hope; *Bank of Scotland v Brunswick Developments (1987) Ltd (No 2)* 1997 SC 226 at 234 per Lord President Rodger.

117 *International Sponge Importers v Watt and Sons* 1911 SC (HL) 57.

for goods was made by cheque in the name of the principal, sent directly by the customer to the principal. The agent began to accept payment either by cheque made out in his own name or in cash, and eventually absconded with the principal's funds. It was held that the principal could not recover such sums from the customer, having failed to object to the new method of payment used by the agent. Thus far, *International Sponge Importers* seems to be a classic case of apparent authority where the principal has acquiesced in a new course of dealing. However, evidence of the principal's acquiescence was extremely weak. In fact, he may only have been aware of one incidence of unauthorised behaviour, and even that was doubtful. Yet although the role of the principal's conduct was minor, it seems unlikely that the case can be used as evidence of adoption of the risk principle. Legal analysis in the House of Lords was scant, and the case has subsequently been described as a decision "on its own facts".¹¹⁸ It is typical of agency cases of the period in which the judiciary selects the party on whom, in their opinion, the loss ought to fall, but without fully explaining why.¹¹⁹

(b) International instruments

In international instruments, the "of the principal's own doing" idea is reflected in different ways: under the Convention apparent authority applies where the conduct of the principal "causes" the third party's belief,¹²⁰ under PECL where the principal's "statements or conduct induce" the third party's belief,¹²¹ and under PICC where the principal "causes" the third party's belief.¹²² However, the comments to PICC provide that both the position occupied by the apparent agent in the organisation's hierarchy and also the type of transaction involved can constitute apparent authority.¹²³ This is confirmed by examples given in the comments, the first of which is as follows:¹²⁴

A, a manager of one of company B's branch offices, though lacking actual authority to do so, engages construction company C to redecorate the branch's premises. In view of the fact that a branch manager normally would have the authority to enter into such a contract, B is bound by the contract with C since it was reasonable for C to believe that A had actual authority to enter into the contract.

118 *British Bata Shoe Co v Double M Shah Ltd* 1980 SC 311 at 317 per Lord Jauncey.

119 See *Mortimer v Hamilton* (1868) 7 M 158 at 161 per Lord Deas; *J M & J H Robertson v Beatson, M'Leod & Co Ltd* 1908 SC 921 at 923 per the Lord Ordinary (Lord Johnston). This tendency is also noted in Gloag, *Contract* (n 2) 147.

120 Art 14(2) UAC.

121 Art 3:201(3) PECL.

122 Art 2.2.5(2) PICC.

123 *UNIDROIT Principles* (n 9) 83-84 (comment 2 to art 2.2.5).

124 *UNIDROIT Principles* (n 9) 84 (comment 2 to art 2.2.5).

PECL too may depart from the principal's conduct as the sole basis of apparent authority. The following example is found in the comments:¹²⁵

A jeweller's shop has instructed its employee not to accept personal cheques from a customer. The employee disregards the instruction. The jeweller is bound by virtue of the employee's apparent authority to accept cheques since payment by personal cheque in jewellers' shops is general practice.

It is worth stating that, although the examples may look like instances of implied usual authority, they are clearly not intended to be so, both being located in the sections on apparent authority. In using these examples, it seems clear that the drafters of PECL and PICC intended to extend apparent authority by adopting the risk principle. However, it is unfortunate that confirmation of this point exists in the comments only and not in the actual rules. As a result, this can provide only weak evidence of its adoption.

(c) *English law*

Like Scots law, English law has not adopted the risk principle.¹²⁶ However, it has begun to depart from the principal's conduct as the sole factor leading to liability. Reynolds has identified a move away from estoppel-type reasoning towards a concept which is based on "the objective analysis applicable to the formation of contracts".¹²⁷ Lord Steyn has taken several opportunities to explore a similar theme, both in judgments¹²⁸ and in articles,¹²⁹ – most famously in the opening lines of his judgment in *First Energy (UK) Ltd v Hungarian International Bank Ltd*:¹³⁰ "A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected."

This approach is quite different from the risk principle. By applying an objective analysis to contract formation, it protects the reasonable expectations of the third party, whether they arise as a result of the principal's conduct or because of other factors. Its flaw is that, followed to a logical conclusion, it dictates that both principal and third party are bound by the contract. As is illustrated above, this is clearly not the case in either English or Scots law where only the principal (and not

125 Lando & Beale, *Principles of European Contract Law* (n 7) 203 (comment D to art 3:201).

126 The importance of the principal's conduct is affirmed in *Armagas Ltd v Mundogas SA* [1986] AC 717.

127 *Bowstead & Reynolds on Agency* (n 30) para 8-029, ultimately concluding that the estoppel justification should be retained. For strong support for a broader rationale see I Brown, "The agent's apparent authority: paradigm or paradox?" (1995) JBL 360

128 *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 903-904.

129 J Steyn, "Contract law: fulfilling the reasonable expectations of honest men" (1997) 113 LQR 433; J Steyn, "Written contracts: to what extent may evidence control language?" (1988) 41 *Current Legal Problems* 23.

130 [1993] 2 Lloyd's Rep 194 at 196. See also 204.

the third party) is “bound” in the sense of being barred from pleading the agent’s lack of authority. But while this approach cannot, therefore, provide an entirely satisfactory solution, it is indicative of a growing feeling that the principal ought to be liable in more situations than is currently the case under the estoppel-based regime.

(d) *Dutch law*

As already mentioned, Dutch law appears to have adopted the risk principle. Admittedly, the provision on apparent authority in the Civil Code stipulates that a reasonable belief by the third party of the existence of authority must have been created by the principal himself, i.e. by means of his declaration or conduct.¹³¹ However, since 1970 this so-called “of the principal’s own doing” idea has been criticised by various writers, starting with Schoordijk, who was – interestingly enough – inspired by the Anglo-American doctrine of apparent authority.¹³² Although there are differences of detail, these writers advocate replacing or supplementing the “of the principal’s own doing” idea by the risk principle.¹³³ Equally, it is possible to identify a trend in the decisions of the Dutch Supreme Court¹³⁴ towards more emphasis on who should bear the risk for giving the impression of power of representation, and less emphasis on the “of the principal’s own doing” idea, particularly in cases where the principal is a legal person.¹³⁵

The landmark case in this respect is *Felix v Aruba*.¹³⁶ Mr Felix entered into negotiations with the airport manager of the international airport in Aruba regarding the transport of crew and passengers of light aircraft. In anticipation of a formal licence, Felix handled arrangements for light aircraft between March and December 1986. However, in November 1986 the Minister of Transport and Communication decided that, in future, the transport of crew and passengers

131 Art 3:61(2) Dutch Civil Code.

132 H C F Schoordijk, “Het leerstuk van de opgewekte schijn van volmacht en de Engels-Amerikaansrechtelijke leer van de ‘apparent authority’”, in *Honderd jaar rechtsleven. De Nederlandse Juristen-Vereniging 1870-1970* (1970) 1, reprinted in J M van Dunné, J H Nieuwenhuis, J B M Vranken (eds), *Verspreid werk van prof mr H C F Schoordijk* (1991) 197.

133 S C J J Kortmann, *Mr C Asser’s Handleiding tot de beoefening van het Nederlands burgerlijk recht, Vertegenwoordiging en rechtspersoon, De vertegenwoordiging*, 8th edn (2004) nos 38-43, with further references.

134 *Hoge Raad* (henceforth HR).

135 HR 4 June 1976, 1977 *Nederlandse Jurisprudentie* (henceforth NJ) 336 (*Liberty II*); HR 27 Jan 1984, 1984 NJ 545 (*WGO v Koma*); HR 24 April 1992, 1993 NJ 190 (*Kuyt v MEAS*); HR 27 Nov 1992, 1993 NJ 287 (*Felix v Aruba*); HR 19 Nov 1993, 1994 NJ 622 (*COVA*); HR 9 Oct 1998, 1999 NJ 581 (*Hartman v Bakker*); HR 23 Oct 1998, 1999 NJ 582 (*Nacap v Kurstjens*). But see HR 24 Dec 1993, 1994 NJ 303 (*Credit Lyonnais Bank v T*); HR 12 Jan 2001, 2001 NJ 157 (*Kuijpers v Wijnveen*) which stipulated the requirement that it should be the “doing” of the principal.

136 HR 27 Nov 1992, 1993 NJ 287.

would be conducted exclusively by Air Aruba NV, and Felix was forced to close his business. Felix filed a claim both for reliance expenses and for expectation damages (loss of profit). He argued that he had dealt with light aircraft from March 1986 onwards at the request of the Aruban government. During negotiations the airport manager had led him to believe that he would be able to continue to do so. The government therefore was in breach of contract. In reply, the government argued that the airport manager was not authorised to bind it. The Supreme Court held that, in the case of negotiations between a government functionary and a third party who incorrectly assumes that the functionary is authorised to bind the government, such an incorrect assumption might sometimes be the government's responsibility. This would occur where an authorised body led the third party to believe that the functionary was authorised to bind the government, but other factors might tend towards the same result, such as (i) the position of the functionary within the government organisation and his declarations or conduct (ii) the circumstance that the organisation or division of authorities is non-transparent for third parties due to lack of clarity, complexity or inaccessibility of the relevant regulations, and (iii) an omission on the side of the government to warn the third party that the functionary is unauthorised.

Felix v Aruba shows that not only the declarations or conduct of the principal are relevant for the purposes of apparent authority¹³⁷ but also other circumstances lying within his sphere of risk, such as the non-transparent structure of the company and the position of the agent within the organisation. The case involved unauthorised representation of a government authority, but there seems to be no good reason why the reasoning should not also apply to unauthorised representation of private legal persons.¹³⁸

In any event, in *Hartman v Bakker*,¹³⁹ a case involving unauthorised representation of a private legal person, it was accepted that the function of a representative within the organisation of the principal can lead to an appearance of authority which may be successfully invoked by the third party where the representative concludes a contract in the principal's name which appears to be in line with his appointment.¹⁴⁰ In yet another case, *Kuyt v MEAS*,¹⁴¹ it was stated that a person to whom a bailiff offers a settlement may, in general, assume that the bailiff has

137 Including inaction where the principal had a duty to act. That inaction on the part of the principal can lead to apparent authority is not new: see e.g. HR 1 March 1968, 1968 NJ 246 (*Molukse Evangelische Kerk v Clijnk*).

138 Cf P van Schilfgaarde in his annotation no 2 to HR 27 Nov 1992, 1993 NJ 287 (*Felix v Aruba*).

139 HR 9 Oct 1998, 1999 NJ 581.

140 See A L H Ernes, "Schijn van volmacht op grond van functie?" (1999) 6346 *Weekblad voor Privaatrecht, Notariaat en Registratie* 143.

141 HR 24 April 1992, 1993 NJ 190.

sufficient authority to do so. Not surprisingly, some writers have favoured an explanation of these cases based on usual authority.¹⁴²

(e) The risk principle: for and against

In favour of the risk principle, it can be said that it avoids the strained expansion of the “of the principal’s own doing” idea which is currently taking place. More and more factors are being classed, unconvincingly, as “conduct” of the principal.¹⁴³ By expanding liability beyond “conduct”, the risk principle allows the courts to focus on issues lying within the principal’s responsibility. To this extent it is a less artificial method of imposing liability. It makes explicit factors which were already implicit in apparent authority reasoning, and provides those factors with a clearer legal basis. As a more nuanced approach, it enables the courts to reach solutions which can be tailor-made to the case. In this way the courts can redress a balance which, at the moment, is weighted towards protection of principal rather than third party.

Against the risk principle is the possibility of a large, and perhaps unmanageable, increase in the principal’s liability. Whether this is likely to occur is difficult to say. It may be that the end result would not be markedly different from the current approach, in which the “of the principal’s own doing” idea is artificially extended. Like any discretionary concept, its success depends on the manner in which it is applied by the courts. It is unlikely that the discretion could be limited by specifying all potentially relevant issues: the courts would be asked to apply a relatively open discretion, guided by factors highlighted as significant in existing case law. Certainly the Dutch experience suggests that the discretion is workable. It may even act as an incentive for the principal to ensure that his agents act within the confines of their authority in the future.

It is unlikely that the Scottish courts are in a position to take the leap which would be involved in the adoption of the risk principle. For the moment that principle should probably remain within the realms of academic debate. Its presence in the explanatory notes of PECL and PICC will at least ensure that it remains on the wider European agenda.

142 See S C J J Kortmann, *Mr C Asser’s Handleiding tot de beoefening van het Nederlands burgerlijk recht* (n 133) nos 36, 39, 48; E Tjong Tjin Tai, “Driemaal schijnvolmacht” 2001 *Nieuwsbrief* BW 70; A L H Ernes, “Aanstellingsvolmacht, schijn van volmachtverlening en ‘usual authority’” 2004 *Nederlands Tijdschrift voor Burgerlijk Recht* 167.

143 See e.g. *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd’s Rep 194 at 201 per Steyn LJ; *Pacific Carriers Ltd v BNP Paribas* (2004) 208 ALR 213 at 226 (a decision of the full court).

(2) The third party's reasonable belief as to the agent's authority

Whether or not supplemented by the risk principle, the “of the principal's own doing” idea is only the first step in an apparent authority action. The conduct of the third party must also be analysed. As part of this exercise, Reid and Blackie's framework utilises “indicators of unfairness”, not all of which are relevant in each case.¹⁴⁴ Two of particular relevance in the present context are (i) “the obligant reasonably believed that the right would not be exercised”¹⁴⁵ and (ii) “as a result of that belief the obligant acted, or omitted to act, in a way which was proportionate.”¹⁴⁶ Applied to an apparent authority case, they become: the third party reasonably believed that the principal would not deny the agent's authority, and this reasonable belief caused the third party to act or to omit to act, on the basis that the agent's authority would not be denied. Admittedly, it is more usual, in apparent authority cases, to identify the third party's belief in the extent of the agent's authority, whereas the personal bar framework directs attention to the belief that the principal would not *deny* that authority. However, this is a difference of emphasis only: the same issue looked at from a negative as opposed to a positive angle. This difference also seems minor when one considers the emphasis Reid and Blackie place on the context-specific nature of personal bar.¹⁴⁷ The indicators may require to be adjusted to accommodate specific factual scenarios.

The apparent authority cases in Scotland certainly suggest that the third party's belief must be reasonable. More specifically, the cases indicate that the circumstances of a transaction may be so unusual as to give rise to a duty of inquiry on the part of the third party.¹⁴⁸ If so, failure to inquire will negative apparent authority. This has recently been affirmed in several cases¹⁴⁹ including one before the First Division.¹⁵⁰ It is also clear that the further a transaction strays from the normal course of business, the more likely it is that the courts will find that apparent authority was not present.¹⁵¹ Thus, where an agent offered a price to a third party which was below market value, indicating that he was “hard up” and “badly wanting

144 Reid & Blackie, *Personal Bar* (n 62) para 2-40.

145 Reid & Blackie, *Personal Bar* (n 62) paras 2-47-2-50.

146 Reid & Blackie, *Personal Bar* (n 62) paras 2-51-2-54.

147 See Reid (n 56) at 365-366.

148 *City of Glasgow Bank v Moore* (1881) 19 SLR 86 at 93 per Lord President Inglis; *Paterson Bros v Gladstone* (1891) 18 R 403 at 406 per Lord President Inglis; *Thomas Hayman & Sons v The American Cotton Oil Co* (1907) 45 SLR 207; Gloag, *Contract* (n 2) 151-152.

149 *British Bata Shoe Co Ltd v Double M Shah Ltd* 1980 SC 311 at 318 per Lord Jauncey, relying on Scottish authority cited by Gloag, *Contract* (n 2) 151-2 and on F M B Reynolds and B J Davenport, *Bowstead on Agency*, 14th edn (1976) 253-254.

150 *Dornier GmbH v Cannon* 1991 SC 310 at 315 per Lord President Hope.

151 See, for example, *Colvin v Dixon* (1867) 5 M 603; *Hamilton v Dixon* (1873) 1 R 72; *Walker v Smith* (1906) 8 F 619; *Dornier GmbH v Cannon* 1991 SC 310 at 315 per Lord President Hope.

money”, it was found, unsurprisingly, that there was no apparent authority.¹⁵² The result was the same where a third party was asked to send cheques to an employee of the principal with the name of the payee left blank, and the cheques were returned after payment with the employee entered as payee.¹⁵³

A similar emphasis on the reasonableness of the third party's belief can be found in the international instruments. The comments to PECL say that statements or conduct by the principal “must have induced a reasonable and good faith belief in the third party”.¹⁵⁴ Less helpfully, the comments to PICC indicate that this question depends on the circumstances of the case.¹⁵⁵

In this area, therefore, there appear to be few substantive differences between Scots law and the terms of the international instruments. In particular, neither the presence in the instruments of a duty of good faith nor the relatively undeveloped state of the duty in Scots law has proved significant. The same factual circumstances which have motivated the Scots judiciary would undoubtedly also be relevant under the international instruments.

(3) Causation

In Scots law the third party must actually have believed in the existence of authority, and a causal nexus must exist between the principal's conduct and that belief. This is illustrated in cases where an absence of actual belief proves fatal to a plea of apparent authority.¹⁵⁶ Although all three international instruments adopt a similar approach,¹⁵⁷ PICC and the Convention may be more limited than PECL. Both use “cause” (and not “permit”, as PECL do) when referring to the principal's conduct. Reynolds has suggested that the word “cause” may denote active and not passive conduct (he prefers the use of “permit”).¹⁵⁸ The issue has not been addressed at a similar level of detail in Scots law.

(4) Detriment

In Scots law, the fourth indicator within Reid and Blackie's framework is relevant to the issue of the extent of loss or detriment that the third party must suffer. It

152 *Thomas Hayman & Sons v The American Cotton Oil Co* (1907) 45 SLR 207.

153 *British Bata Shoe Ltd v Double M Shah Ltd* 1980 SC 311.

154 Lando & Beale, *Principles of European Contract Law* (n 7) 203 (comment D to art 3:201).

155 *UNIDROIT Principles* (n 9) 83-84 (comment 2 to art 2.2.5).

156 *Smith v North British Railway Co* (1850) 12 D 795; *The North of Scotland Banking Company v Behn, Möller & Co* (1881) 8 R 423; *City of Glasgow Bank v Moore* (1881) 19 SLR 86; *Main & Co v Young* (1907) 23 Sh Ct Rep 295. See also Reid & Blackie, *Personal Bar* (n 62) paras 2-51-2-54.

157 See Lando & Beale, *Principles of European Contract Law* (n 7) 203 (comment D to art 3:201); art 14(2) UAC; art 2.2.5(2) PICC.

158 Reynolds (n 70) at 15.

stipulates that “the exercise of the right would cause prejudice to the obligant which would not have occurred but for the inconsistent conduct.”¹⁵⁹ Thus, were the principal to deny the agent’s authority, prejudice would be caused to the third party which would not have occurred but for the principal’s inconsistent conduct. Although the concept of “prejudice” is clearly important, according to Reid it can be easily established: “Prejudice is almost always present, or B [the obligant] would not trouble to oppose A [the rightholder].”¹⁶⁰ Prejudice in itself is, however, insufficient. A further causal nexus must be present, linking the principal’s inconsistent conduct with the prejudice which would be suffered if the principal were permitted to act in this way.¹⁶¹ To explain the type of prejudice required, Reid quotes an influential statement from Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd*:¹⁶² “the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it.”

The prejudice in an apparent authority case is clear. Expecting to be bound to the principal by a valid contract, the third party finds that the principal denies its existence. The causal nexus also exists: this prejudice would not have occurred but for the principal’s inconsistent conduct.

The international instruments omit any reference to prejudice or equivalent. This seems surprising in the cases of PICC and the Convention, given their use of a traditional form of Common Law estoppel by representation. Change of position on the part of the third party is a requirement of that concept.¹⁶³ In the case of PICC the omission is the more surprising because, according to the explanatory comments,¹⁶⁴ the doctrine of apparent authority is an application not only of the general principle of good faith¹⁶⁵ but also of the prohibition of inconsistent behaviour.¹⁶⁶ In PICC the general provision in article 1.8 requires detrimental reliance, whereas article 2.2.5(2), which deals only with apparent authority, does not. The omission of detrimental reliance in PECL is not at all surprising, the formulation of apparent authority which appears there not being estoppel-based.

Should Scots law drop the loss component from its definition of apparent authority, in the light of its omission from the international instruments? After

159 Reid & Blackie, *Personal Bar* (n 62) paras 2-55–2-59.

160 Reid (n 56) at 359.

161 Reid (n 56) at 359.

162 (1937) 59 CLR 641 at 674, cited with approval by Lord Rodger in *William Grant v Glen Catrine Bonded Warehouse* 2001 SC 901 at 921. See also Spencer Bower, *Estoppel by Representation* (n 93) V.5.9.

163 Spencer Bower, *Estoppel by Representation* (n 93) V.5.1-V.5.6.

164 UNIDROIT *Principles* (n 9) 83 (comment 2 to art 2.2.5).

165 Art 1.7 PICC.

166 Art 1.8 PICC.

all, according to Reid prejudice is “almost always present.”¹⁶⁷ One is tempted to advocate the removal of such an empty requirement. Third parties seem unlikely to raise claims where they have suffered no, or only minimal, loss.

Having chosen not to stipulate prejudice or loss, the international instruments need not specify the measure of damages. Given the nature of the third party's loss as the loss of an expected contract, damages ought to be calculated using the normal expectation measure rather than the reliance measure – although bearing in mind that, in theory, a contract does not exist.

H. CONCLUSION

This article has sought to shed light on the principles of apparent authority in Scots law. One of the aims has been to identify the relevant Scottish case law so that it can be used in future cases in preference to the broad statements of apparent authority found in English case law. As has been more fully argued above, there are many reasons why this would be a welcome development, not least because now is not the time to assimilate with English law, when harmonisation at a European level is likely.

This comparison has disclosed few major differences between Scots law and the terms of the international instruments. Crucially, like Scots law, PICC and the Convention adopt an estoppel- or bar-based concept, and it is only PECL, through the use of a deeming provision, which allows the unauthorised agent to create a valid contract. PECL's approach leads to significant benefits in the form of simplified remedies, but conceptual difficulties remain. Scots law could not move in a similar direction without dropping the basis of personal bar.

The absence from Scots law of a fully developed duty of good faith has not proved of significance. The content of apparent authority is remarkably similar to that contained in the international instruments. Only one difference has been identified, namely, that in Scotland the third party can opt not to recognise apparent authority whereas the third party under PECL seems unable to do so.

Finally, the terms of the international instruments cast doubt on the role of loss in the concept of apparent authority. It is, of course, required, but the instruments appear to take the view that it is so obvious that it may go unsaid. There must be an argument that the same should be true in Scotland.

For the future, attention should be given to the development of the risk principle. It is clear that there is dissatisfaction with the limitations of an estoppel- or bar-based system. Too often, it tends to favour the principal at the third party's expense. Adoption of the risk principle would increase third party protection, and

¹⁶⁷ Reid (n 56) at 359.

the experience of Dutch law suggests that it can be adopted without significant problems. In view of the very weak support which it currently commands from the terms of the international instruments, the best course in Scotland is probably to wait and see. The focus of attention should be preparation for further harmonisation of agency law at European level, whatever form this may take.